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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 110321208-1203-01]

RIN 0648-BA89

High Seas Driftnet Fishing Moratorium Protection Act;
Identification and Certification Procedures to Address Shark
Conservation

AGENCY: National Marine Fisheries Service (NMFS), National
Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed action sets forth identification and certification procedures established by the Shark Conservation Act to address shark conservation in areas beyond any national jurisdiction. The objectives of these procedures are to promote the conservation and sustainable management of sharks. Agency actions and recommendations under this rule will be in accordance with U.S. obligations under applicable international trade law, including the World Trade Organization (WTO) Agreement. This action would also amend the definition of illegal, unreported, or unregulated (IUU) fishing for purposes of the High Seas Driftnet Fishing Moratorium Protection Act.

DATES: Written comments must be received no later than 5 p.m. Eastern time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

NMFS is soliciting feedback on the proposed rule. Information and comments concerning this proposed rule may be submitted by any one of several methods (see ADDRESSES). Information related to the international fisheries provisions of the Moratorium Protection Act can be found on the NMFS Web site at <http://www.nmfs.noaa.gov/msa2007/intlprovisions.html>. NMFS will consider all comments and information received during the comment period in preparing a final rule.

ADDRESSES: Written comments on this action, identified by RIN 0648-BA89, may be submitted by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.
- Mail: Laura Cimo, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly

accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Laura Cimo, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, at (301) 427-8359.

SUPPLEMENTARY INFORMATION:

Background

On January 12, 2011, the National Marine Fisheries Service (NMFS) published a final rule establishing identification and certification procedures to address illegal, unreported, or unregulated (IUU) fishing activities and bycatch of protected living marine resources (PLMRs) pursuant to the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) (76 FR 2011) (50 CFR 300.200 et seq.) (16 U.S.C. 1826h-k). The identification and certification procedures must be amended to reflect recent statutory amendments to the Moratorium Protection Act. These amendments were included in the Shark Conservation Act (Public Law 111-348), which was enacted on January 4, 2011.

Sharks present an array of challenges for fisheries conservation and management due to their biological characteristics and lack of general data reported on catch of each species. Many shark species are characterized by relatively slow growth, late maturity, and low reproductive rates, which can make them particularly vulnerable to overexploitation and slow to recover. As demand and exploitation rates for some shark species, and particularly for shark fins, have increased, concern has grown regarding the status of many shark stocks and the sustainability of their exploitation in global fisheries.

The United States continues to be a leader in promoting shark conservation and management globally. We are committed to working bilaterally and multilaterally to promote shark conservation and management, and prevent shark finning so that legal and sustainable fisheries are not disadvantaged by these activities. In particular, the United States wants to ensure that its own import market does not encourage unsustainable activity.

Under the amendments in the Shark Conservation Act, the Secretary of Commerce is required to identify a foreign nation if: (a) the nation's fishing vessels are engaged or have been engaged during the preceding calendar year, in fishing activities or practices in waters beyond any national

jurisdiction that target or incidentally catch sharks; and (b) the nation has not adopted a regulatory program for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discarding of the carcass of the shark at sea, that is comparable to that of the United States, taking into account different conditions. The amendments also call upon the Secretary of Commerce to begin making identifications no later than January 4, 2012.

NMFS solicited information from the public on activities of fishing vessels from foreign nations engaged in shark catch beyond any national jurisdiction on March 24, 2011 (76 FR 16616), and indicated that it anticipated making the first identifications under this statute by January 4, 2012. However, upon further reflection and review of the statute, NMFS proposes to begin the process of making identifications by January 4, 2012, and publish the first identifications in the January 2013 Biennial Report to Congress, coincident with the next identification process under the IUU fishing and bycatch provisions of the Moratorium Protection Act. This approach is consistent with the statute and will treat all identified nations equally. If identifications were made in January 2012, it would have provided potentially-affected foreign nations only one year to become familiar with the new shark provisions before

identification decisions were made and only one year to take the necessary actions to receive a positive certification. NMFS has already started collecting and analyzing information that could help the agency determine which nations may have vessels engaging in fishing activities or practices on the high seas that target or incidentally catch sharks.

The Secretary of Commerce will issue either a positive or negative certification to each nation that is identified in the biennial report to Congress. In the unlikely event that the Secretary of Commerce does not make a certification decision, alternative certification procedures may be applied. A positive certification indicates that the nation has taken the necessary actions pursuant to the Moratorium Protection Act. If an identified nation does not receive a positive certification, fishing vessels of such nation would be, to the extent consistent with international law, subject to the denial of entry into any place in the United States and to the navigable waters of the United States. Additionally, if an identified nation does not receive a positive certification, the Secretary of Commerce shall so notify the President of the United States. This notification may include recommendations to prohibit the importation of certain fish and fish products from the identified nation. The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive

measures, to be taken against identified nations that have not received a positive certification, to address the fishing activities or practices for which such nations were identified in the biennial report. The Secretary of Commerce will make such recommendations on a case by case basis in accordance with international obligations, including the WTO Agreement. Upon this notification, the High Seas Driftnet Fisheries Enforcement Act (16 U.S.C. 1826a) authorizes the President to direct the Department of Treasury to prohibit the importation of certain fish and fish products from such nation.

If certain fish and fish products are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the shark catch described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such shark catch or that a nation has taken retaliatory action against the United States. This certification is deemed to be a certification under section 1978(a) of Title 22, which provides that the President may direct the Secretary of the Treasury to prohibit the bringing or

the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the WTO.

The final rule establishing identification and certification procedures pursuant to the Moratorium Protection Act (published on January 12, 2011) also set forth a definition of IUU fishing for purposes of the Moratorium Protection Act (50 CFR 300.201). In response to public comments on the rule, NMFS committed to consider amending this regulatory definition in a subsequent rulemaking to make any necessary technical changes and incorporate suggestions made by the public. Through this action, NMFS also proposes to amend the definition of IUU fishing to include fishing activities that violate shark conservation measures required under an international fishery management agreement to which the United States is a party. Amendments to the Identification and Certification Procedures to Address Shark Conservation

Pursuant to the Shark Conservation Act, NMFS proposes to amend the identification and certification procedures under the Moratorium Protection Act. This will provide for the identification of a foreign nation if fishing vessels of that nation are engaged, or have been engaged during the preceding calendar year, in fishing activities or practices in waters

beyond any national jurisdiction that target or incidentally catch sharks, and the nation has not adopted a regulatory program for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions. When making identification decisions, NMFS will take into account whether the nation has adopted a regulatory program for the conservation and management of sharks in their domestic waters that could have bearing on shark conservation on the high seas. NMFS does not intend to identify nations, or issue a negative certification for identified nations, on the basis of a nation's failure to establish a comparable regulatory program in their domestic waters if the regulatory deficiency is not relevant to the nation's regulation of high seas shark catch. When determining whether a nation could potentially be identified for these activities through the process set forth in final regulations that were published on January 12, 2011 (76 FR 2011), NMFS will review, evaluate and verify relevant information obtained from credible sources by the agency demonstrating that foreign-flagged vessels engaged in fishing activities or practices in areas beyond any national jurisdiction that targeted or incidentally caught sharks during the relevant timeframe. This

information could include data gathered by the U.S. Government as well as offered by other nations, international organizations (such as regional fisheries management organizations), institutions, bilateral or other arrangements, or non-governmental organizations.

Corroboration of information may be addressed through cooperation with governments, international organizations, non-governmental organizations, and through use of other credible information as appropriate. NMFS, acting through or in consultation with the State Department, may as appropriate initiate bilateral discussions with the nation whose vessels engaged in such fishing activities to:

- Communicate the provisions of the Moratorium Protection Act to the nation;
- Provide an opportunity for nations to provide additional information on the fishing activities of particular vessels; and
- Determine if the nation has adopted a regulatory program for the conservation of sharks for their vessels fishing on the high seas, including measures to prohibit the removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions.

When making its identification decisions, NMFS will take into account relevant matters, including, but not limited to,

the history, nature, circumstances, and gravity of the fishing activities that targeted or incidentally caught sharks in areas beyond any national jurisdiction. NMFS will also take into account any actions taken by the nation that are relevant to the conservation and sustainable management of sharks in areas beyond any national jurisdiction, including:

- If the nation has adopted a regulatory program for the conservation of sharks;
- Participation in cooperative research activities designed to mitigate the impacts of fishing activities that result in the incidental catch of sharks;
- Programs for data collection and sharing, including programs to assess the abundance and status of sharks and observer programs; and
- The adoption and use of strategies, techniques, and equipment for the reduction and mitigation of shark bycatch, if vessels of the nation have shark bycatch.

If any relevant international organization or regional fishery management organization (RFMO) has adopted measures for the conservation and sustainable management of sharks, NMFS will consider whether the nation is a party or cooperating non-party to the organization, and/or whether the nation has implemented such measures.

By January 4, 2012, NMFS began the process of making identifications of nations whose fishing vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks and have not adopted a regulatory program for the conservation of sharks on the high seas, including measures to prohibit removal of any of the fins of the shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions. Identifications will be published in the biennial report to Congress, as required by the Moratorium Protection Act. The next biennial report is due to Congress on January 12, 2013.

Nations will be notified of their identification under the Moratorium Protection Act, and NMFS, acting through or in consultation with the State Department, will initiate consultations to encourage identified nations to take the necessary actions pursuant to the Moratorium Protection Act.

Although the Secretary of Commerce is authorized not to issue a certification decision to an identified nation under the Moratorium Protection Act, the Secretary of Commerce will issue either a positive or negative certification to each identified nation, which will be published in the subsequent biennial report to Congress, for all nations that are identified.

In determining whether to issue a positive or negative certification for each identified nation, the Secretary of Commerce, in consultation with the Secretary of State, will take into account all relevant facts and circumstances, including, but not limited to, the record of consultations with such nation, results of these consultations, and actions taken by the nation and any applicable RFMO to address the fishing activities of concern described in the biennial report.

To receive a positive certification, any nation that is identified as having fishing vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks will need to provide documentary evidence of the adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of these measures. In order to receive a positive certification, such nation will also need to establish a management plan that assists in the collection of species-specific data.

When evaluating whether an identified nation whose pelagic longline vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks has adopted a regulatory program for the conservation of sharks that

is comparable in effectiveness to that of the United States, the proposed rule would not require the regulatory program to include the mandatory use of circle hooks, as specified for nations identified under Section 610 of the Moratorium Protection Act, since there is scientific uncertainty about the impact of circle hook use on shark bycatch and the United States does not require the use of circle hooks in its fisheries to mitigate shark bycatch.

NMFS will notify nations prior to a formal certification determination, and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate actions taken to adopt a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States, taking into account different conditions, and establish a management plan that assists in the collection of species-specific data. The Secretary of Commerce shall consider any relevant information received during consultations when making its formal certification determination.

Changes to the IUU Fishing Definition

NMFS proposes to amend the definition of IUU fishing, consistent with the purposes of the Moratorium Protection Act, in order to more comprehensively address IUU fishing, and thus

more effectively address this serious problem that threatens the sustainable management of the world's fisheries.

First, NMFS proposes to amend the IUU fishing definition to clarify its application to fishing activities conducted by fishing vessels of both party and non-party nations to international fishery management agreements to which the United States is a party. The first paragraph of the current IUU fishing definition addresses fishing activities that violate conservation and management measures of an RFMO to which the United States is a party. NMFS proposes to amend this paragraph to clarify that it is intended to apply to nations that are a party to the relevant international fishery agreement. NMFS also proposes to add a new paragraph clarifying that, in the case of non-parties to an international fishery management agreement to which the United States is a party, fishing activities that would undermine the conservation of the resources managed under that agreement can be IUU fishing.

Second, pursuant to the Shark Conservation Act, NMFS proposes to amend the IUU fishing definition to explicitly include fishing activities in violation of shark conservation measures that are required by an RFMO to which the United States is a party.

Third, NMFS proposes to clarify that the IUU fishing definition applies when a nation fails to report or fails to

provide accurate or complete data and information regarding its vessels' fishing activities as required by an RFMO to which the United States is a party. By adding an explicit reference to reporting, NMFS intends to highlight the importance of compliance with RFMO data collection requirements to support effective fisheries management.

Fourth, NMFS proposes to amend the IUU fishing definition to include fishing activities conducted by foreign flagged vessels in waters under U.S. jurisdiction without authorization of the United States. Such activities undermine the ability of the United States to sustainably manage its fisheries.

In determining whether to make an IUU fishing identification, NMFS will take into account all relevant information, in accordance with § 300.202 (a)(2). In addition, when determining whether to identify a foreign nation for having vessels engaged in fishing activities within the U.S. exclusive economic zone (EEZ) without authorization of the United States, NMFS will consider any actions taken by the United States, the flag State and, where relevant, the international fishery management organization, to address those activities, as well as the effectiveness of such actions.

Application of IUU Fishing Identification Criteria

In addition to the regulatory changes identified above, NMFS is reconsidering the manner in which it has applied Section

609 of the Moratorium Protection Act and its implementing regulations. To date, NMFS has primarily applied this Act and implementing regulations to identify a nation when the nation's vessels were engaged in illegal, unregulated, or unreported fishing activity that was directly attributable to specific vessel conduct. In future identifications, NMFS intends to identify nations based on fishing activity that was illegal, unreported, or unregulated because of either the vessels' conduct or the nation's actions or inactions in managing its fisheries.

After two cycles of identification, NMFS has determined that these provisions could be applied more broadly. In order to more comprehensively address IUU fishing, we must consider not only the prohibited actions of fishing vessels but also non-compliance in the form of action or inaction at the national level that leads to IUU fishing. To further this goal, NMFS is proposing to identify a nation based on the nation's actions or inactions that lead to fishing by vessels registered under their flag that is not in accordance with RFMO conservation and management measures. For example, under this approach, NMFS could identify a nation when the nation has failed to implement measures that are required by an RFMO to which the United States is a party, and as a result the fishing vessels of that nation

operated in a manner inconsistent with the relevant RFMO conservation and management measures.

This approach is consistent with the plain language of the statutory guidelines provided in Section 609(e)(3)(A) of the Moratorium Protection Act for the IUU fishing definition. These statutory guidelines specifically mention certain RFMO conservation and management measures, such as catch limits or quotas, that must be implemented by nations that are parties to the RFMO and cannot necessarily be attributed to specific fishing vessels. For example, RFMOs can establish quotas for their member nations. Each nation bears the responsibility for implementing and adhering to the quota it received. Individual fishing vessels, therefore, cannot be found in violation of the RFMO's quota, but action or inaction by the flag nation could result in fishing activity in violation of the quota. In addition to specific situations mentioned in the minimum statutory guidelines for the IUU fishing definition, there are other circumstances in which fishing activities might violate RFMO measures because of a nation's failure to govern its own fishing vessels or carry out its own responsibilities. For example, RFMOs require parties to implement data reporting requirements. In most cases, the nations, and not individual vessels, compile and report the requisite information to comply

with RFMO conservation and management measures. Because many measures are inherently a nation's responsibility, Congress evidently intended NMFS to be able to identify a nation based on its failure to fulfill the requirements of the relevant RFMO and the operations of the nation's fisheries in light of this failure.

Under the proposed approach, a nation could be identified for fishing activities that were illegal, unregulated, or unreported because of national action or inaction, including, consistent with the examples discussed above, fishing activities that resulted in the nation exceeding a harvest quota granted by the relevant RFMO because the nation failed to implement measures to prevent such overharvest, and fishing activities that were not reported because the nation failed to carry out its responsibilities for reporting to ensure collection of such information.

Classification

This proposed rule is published under the authority of the Moratorium Protection Act, 16 U.S.C. 1826d-1826k, as amended by the Shark Conservation Act (Public Law 111-348).

This proposed rulemaking has been determined to be significant for the purposes of Executive Order 12866.

Pursuant to section 605 of the Regulatory Flexibility Act,

the Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. In this rulemaking, NMFS proposes to amend the identification and certification procedures under the Moratorium Protection Act to prevent shark finning and to promote the conservation and sustainable harvest of sharks by fishing vessels of foreign nations, as required under the Shark Conservation Act (Public Law 111-348).

A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. Briefly, under the proposed regulations, NMFS would identify a foreign nation in a biennial report to Congress if fishing vessels of that nation have been engaged during the preceding calendar year in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks and the nation has not adopted a regulatory program for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discarding of the carcass of the shark at sea, that is comparable to that of the United States, taking into account different conditions. The Secretary of

Commerce will issue either a positive or negative certification to each nation that is identified in the biennial report to Congress. A positive certification would demonstrate that the nation has taken the necessary corrective action to address the fishing activities of concern described in the biennial report to Congress. Nations identified for having vessels engaged in shark catch on the high seas that do not receive a positive certification from the Secretary of Commerce may be subject to measures imposed by the Secretary of the Treasury under the High Seas Driftnet Fisheries Enforcement Act (16 U.S.C. 1826a). Such measures include the denial of port privileges of fishing vessels of those nations, and, as directed by the President, prohibition on the importation into the United States of certain fish and fish products caught by the vessels engaged in the relevant activity for which the nations were identified, or other measures.

To receive a positive certification, any nation that is identified as having fishing vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks will need to provide documentary evidence of the adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States, taking into account different conditions, including conditions that could bear on the

feasibility and effectiveness of measures. Prior to being issued a positive certification, such nation will also need to establish a management plan that assists in the collection of species-specific data in order to receive a positive certification.

Because the proposed regulations are purely procedural in nature, and only set out how NMFS is to make decisions regarding certifications for nations that have been identified in the biennial report to Congress, there are no direct economic impacts on small or large entities. Therefore, the proposed regulations will not have a significant economic impact on a substantial number of small entities and do not need to be analyzed under the Regulatory Flexibility Act. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains collection-of-information requirements for §§ 300.206(b)(2), 300.207(c), and 300.208(c) subject to review and approval by OMB under the Paperwork Reduction Act (PRA). The collection-of-information requirements have been provided to OMB.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling,

Marine resources, Reporting and recordkeeping requirements,
Russian Federation, Transportation, Treaties, Wildlife.

Dated: July 5, 2012.

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part
300 is proposed to be amended as follows:

PART 300--INTERNATIONAL FISHERIES REGULATIONS

1. The authority citation for part 300 continues to read as
follows:

Authority: Moratorium Protection Act, 16 U.S.C. 1826d-1826k

2. Section 300.200 is revised to read as follows:

§ 300.200 Purpose and scope.

The purpose of this subpart is to implement the
requirements in the High Seas Driftnet Fishing Moratorium
Protection Act ("Moratorium Protection Act") to identify and
certify nations whose vessels engaged in illegal, unreported, or

unregulated fishing; whose fishing activities result in bycatch of protected living marine resources; or whose vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks where the nation has not adopted a regulatory program for the conservation of sharks, comparable in effectiveness to that of the United States, taking into account different conditions. This language applies to vessels entitled to fly the flag of the nation in question. Where the Secretary of Commerce determines that an identified nation has not taken the necessary actions to warrant receipt of a positive certification, the Secretary of Commerce may recommend to the President that the United States prohibit the importation of certain fish and fish products from the identified nation or other measures. The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive measures, to be taken against identified nations that have not received a positive certification, to address the fishing activities or practices for which such nations were identified in the biennial report. The Secretary of Commerce will make such a recommendation on a case-by-case basis in accordance with international obligations, including the WTO Agreement. The Moratorium Protection Act also authorizes cooperation and assistance to nations to take action to combat illegal,

unreported, or unregulated fishing, reduce bycatch of protected living marine resources, and achieve shark conservation.

3. In § 300.201, the definition of "Illegal, unreported, or unregulated (IUU) fishing" is revised to read as follows:

§ 300.201 Definitions.

Illegal, unreported, or unregulated (IUU) fishing means:

(1) In the case of parties to an international fishery management agreement to which the United States is a party, fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, bycatch reduction requirements, shark conservation measures, and data reporting;

(2) In the case of non-parties to an international fishery management agreement to which the United States is a party, fishing activities that would undermine the conservation of the resources managed under that agreement;

(3) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures, or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(4) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.

(5) Fishing activities by foreign flagged vessels in U.S. waters without authorization of the United States.

4. In § 300.202, paragraphs (a)(2) and (d)(1) are revised to read as follows:

§ 300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

(a) ***

(2) When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity. NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes

place. If such an organization exists, NMFS will consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization. NMFS will also take into account any actions taken or on-going proceedings by the United States and/or flag State to address the IUU fishing activity of concern as well as the effectiveness of such actions.

(d) ***

(1) The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such determination, the Secretary shall take into account the following:

(i) Whether the government of the nation identified pursuant to paragraph (a) of this section has provided evidence documenting that it has taken corrective action to address the IUU fishing activity described in the biennial report;

(ii) Whether the relevant international fishery management organization has adopted and, if applicable, the identified member nation has implemented and is enforcing, measures to effectively address the IUU fishing activity of the identified nation's fishing vessels described in the biennial report;

(iii) Whether the United States has taken enforcement action to effectively address the IUU fishing activity of the identified nation described in the biennial report; and

(iv) Whether the identified nation has cooperated in any action taken by the United States to address the IUU fishing activity described in the biennial report.

5. In Section 300.203, paragraphs (a)(1), (a)(2), and (c)(1) are revised; paragraph (c)(2) is redesignated as paragraph (c)(3), and a new paragraph (c)(2) is added to read as follows:

(a) ***

(1) NMFS will identify and list, in the biennial report to Congress nations—

(i) whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in fishing activities or practices either in waters beyond any national jurisdiction that result in

bycatch of a PLMR, or in waters beyond the U.S. EEZ that result in bycatch of a PLMR that is shared by the United States;

(ii) if the nation is a party to or maintains cooperating status with the relevant international organization with jurisdiction over the conservation and protection of the relevant PLMRs, or a relevant international or regional fishery organization, and the organization has not adopted measures to effectively end or reduce bycatch of such species; and

(iii) the nation has not implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements, taking into account different conditions that could bear on the feasibility and efficacy of comparable measures.

(2) When determining whether to identify nations as having fishing vessels engaged in PLMR bycatch, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question.

(c) ***

(1) Initiate consultations within 60 days after submission of the biennial report to Congress with the governments of identified nations for the purposes of encouraging adoption of a regulatory program for protected living marine resources that is

comparable in effectiveness to that of the United States, taking into account different conditions, and establishment of a management plan that assists in the collection of species-specific data;

(2) Seek to enter into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

6. Section 300.204 is redesignated as § 300.205 and a new § 300.204 is added to read as follows:

§ 300.204 Identification and certification of nations whose vessels engaged in shark catch.

(a) Procedures to identify nations if fishing vessels of that nation are engaged in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks during the preceding calendar year.—

(1) NMFS will identify and list in the biennial report to Congress nations—

(i) whose fishing vessels are engaged, or have been engaged during the calendar year prior to publication of the biennial report to Congress, in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks; and

(ii) where that nation has not adopted a regulatory program to provide for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of measures.

(2) When determining whether to identify nations for these activities, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, duration, and gravity of the fishing activity of concern.

(b) Notification of nations identified as having fishing vessels engaged in fishing activities or practices that target or incidentally catch sharks. Upon identifying in the biennial report to Congress a nation whose vessels engaged in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify identified nations about the requirements under the Moratorium Protection Act and this subpart N.

(c) Consultations and negotiations. Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

(1) Initiate consultations within 60 days after submission of the biennial report to Congress with the governments of identified nations for the purposes of encouraging adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States, taking into account different conditions, and establishment of a management plan that assists in the collection of species-specific data;

(2) Seek to enter into bilateral and multilateral treaties or other arrangements with such nations to protect sharks; and

(3) Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report and, as necessary, request the Secretary of State to initiate the amendment of any existing international treaty to which the United States is a party for the conservation of sharks to make such agreements consistent with this subpart.

(d) International Cooperation and Assistance. To the greatest extent possible, consistent with existing authority and the availability of funds, the Secretary shall:

(1) Provide appropriate assistance to nations identified by the Secretary under paragraph (a) of this section and international organizations of which those nations are members to assist those nations in qualifying for a positive certification under paragraph (e) of this section;

(2) Undertake, where appropriate, cooperative research activities on species assessments and harvesting techniques aimed at mitigating or eliminating the non-target catch of sharks, with those nations or organizations;

(3) Encourage and facilitate the transfer of appropriate technology to those nations or organizations to assist those nations in qualifying for positive certification under paragraph (e) of this section; and

(4) Provide assistance to those nations or organizations in designing, implementing, and enforcing appropriate fish harvesting plans for the conservation and sustainable management of sharks.

(e) Procedures to certify nations identified as having fishing vessels engaged in fishing activities or practices that target or incidentally catch sharks.--Each nation that is identified as having fishing vessels engaged in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks and has not adopted a regulatory program for the conservation of sharks,

including measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable to that of the United States, taking into account different conditions, shall receive either a positive or a negative certification from the Secretary of Commerce. This certification will be published in the biennial report to Congress. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that:

(1) Such nation has provided evidence documenting its adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to regulatory measures required under U.S. law in the relevant fisheries, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of measures; and (ii) Such nation has established a management plan that will assist in the collection of species-specific data on sharks to support international stock assessments and conservation efforts for sharks.

(2) Prior to a formal certification determination, nations will be provided with preliminary certification determinations, and an opportunity to support and/or refute the preliminary determinations, and communicate actions taken to adopt a regulatory program that is comparable in effectiveness to that

of the United States, taking into account different conditions. The Secretary of Commerce shall consider any relevant information received during consultations when making its formal certification determination.

7. Newly redesignated § 300.205 is revised to read as follows:

§ 300.205 Effect of certification.

(a) If a nation identified under § 300.202(a), § 300.203(a), or § 300.204(a) does not receive a positive certification under this subpart (i.e., the nation receives a negative certification or no certification is made), the fishing vessels of such nation are, to the extent consistent with international law, subject to the denial of entry by the Secretary of the Treasury into any place in the United States and to the navigable waters of the United States.

(b) Upon notification and any recommendations by the Secretary of Commerce to the President that an identified nation has failed to receive a positive certification, the President is authorized to direct the Secretary of the Treasury to prohibit the importation of certain fish and fish products from such nation (see § 300.206).

(c) Any action recommended under paragraph (b) shall be consistent with international obligations, including the WTO Agreement.

(d) If certain fish and fish products are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing, bycatch, or shark catch described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity, bycatch, or shark catch or that a nation has taken retaliatory action against the United States. This certification is deemed to be a certification under section 1978(a) of Title 22, which provides that the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization.

(e) Duration of certification. Any nation identified in the biennial report to Congress for having vessels engaged in

IUU fishing that is negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken appropriate corrective action to address the IUU fishing activities for which it was identified in the biennial report. Any nation identified in the biennial report to Congress for having vessels engaged in PLMR bycatch or catch of sharks that is negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken the necessary actions pursuant to the Moratorium Protection Act to receive a positive certification.

(f) Consultations. NMFS will, working through or in consultation with the Department of State, continue consultations with nations that do not receive a positive certification with respect to the fishing activities described in the biennial report to Congress. The Secretary of Commerce shall take the results of such consultations into consideration when making a subsequent certification determination for each such nation.

8. Redesignate § 300.205 as § 300.206, and in newly redesignated § 300.206, revise paragraphs (a) and (b)(4) to read as follows:

§ 300.206 Denial of port privileges and import restrictions on fish or fish products.

(a) ***

(1) Vessels from a nation identified in the biennial report under § 300.202(a), § 300.203(a), or § 300.204(a) and not positively certified by the Secretary of Commerce that enter any place in the United States or the navigable waters of the United States remain subject to inspection and may be prohibited from landing, processing, or transshipping fish and fish products, under applicable law. Services, including the refueling and re-supplying of such fishing vessels, may be prohibited, with the exception of services essential to the safety, health, and welfare of the crew. Fishing vessels will not be denied port access or services in cases of force majeure or distress.

(2) For nations identified in the previous biennial report under § 300.202(a) that are not positively certified in the current biennial report, the Secretary of Commerce shall so notify and make recommendations to the President, who is authorized to direct the Secretary of Treasury to impose import prohibitions with respect to fish and fish products from those nations. Such a recommendation would address the relevant fishing activities or practices for which such nations were identified in the biennial report. Such import prohibitions, if implemented, would apply to fish and fish products managed under an applicable international fishery agreement. If there is no applicable international fishery agreement, such prohibitions, if implemented, would only apply to fish and fish products

caught by vessels engaged in illegal, unreported, or unregulated fishing. For nations identified under § 300.203(a) or § 300.204(a) that are not positively certified, the Secretary of Commerce shall so notify and make recommendations to the President, who is authorized to direct the Secretary of Treasury to impose import prohibitions with respect to fish and fish products from those nations; such prohibitions would only apply to fish and fish products caught by the vessels engaged in the relevant activity for which the nation was identified.

(3) Any action recommended under paragraph (a)(2) shall be consistent with international obligations, including the WTO Agreement.

(b) ***

(4) Removal of negative certifications and import restrictions. Upon a determination by the Secretary of Commerce that an identified nation that was not certified positively has satisfactorily met the conditions in this subpart and that nation has been positively certified, the provisions of § 300.206 shall no longer apply. The Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will notify such nations and will file with the Office of the Federal Register for publication notification of the removal of the import restrictions effective on the date of publication.

9. Redesignate § 300.206 as § 300.207, and in newly redesignated § 300.207, revise the section heading, and paragraph (c), and add paragraph (d) to read as follows:

§ 300.207 Alternative procedures for nations identified as having vessels engaged in IUU fishing activities that are not certified under § 300.202

(c) Fish and fish products offered for entry under this section must be accompanied by a completed documentation of admissibility available from NMFS. The documentation of admissibility must be executed by a duly authorized official of the identified nation and must be validated by a responsible official(s) designated by NMFS. The documentation must be executed and submitted in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

10. Redesignate § 300.207 as § 300.208, and in newly redesignated § 300.208, revise the section heading and add paragraph (d) to read as follows:

§ 300.208 Alternative procedures for nations identified as having vessels engaged in bycatch of PLMRs that are not certified under § 300.203.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

11. Add new § 300.209 to read as follows:

§ 300.209 Alternative procedures for nations identified as having vessels engaged in shark catch that are not certified under § 300.204.

(a) These certification procedures may be applied to fish and fish products from a vessel of a harvesting nation that has been identified under § 300.204 in the event that the Secretary cannot reach a certification determination for that nation by the time of the next biennial report. These procedures shall not apply to fish and fish products from identified nations that have received either a negative or a positive certification under this subpart.

(b) Consistent with paragraph (a) of this section, the Secretary of Commerce may allow entry of fish and fish products on a shipment-by-shipment, shipper-by-shipper, or other basis if the Secretary determines that imports were harvested by fishing activities or practices that do not target or incidentally catch sharks, or were harvested by practices that-

(1) Are comparable to those of the United States, taking into account different conditions; and

(2) Include the gathering of species specific shark data that can be used to support international and regional assessments and conservation efforts for sharks.

(c) Fish and fish products offered for entry under this section must be accompanied by a completed documentation of admissibility available from NMFS. The documentation of admissibility must be executed by a duly authorized official of the identified nation and validated by a responsible official(s) designated by NMFS. The documentation must be executed and submitted in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

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